IN THE

Supreme Court of the United States

October Term, 1975

No. 75-701

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, et al.,

Petitioners,

vs.

WILFRED KEYES, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

William K. Ris
1140 Denver Club Building
Denver, Colorado 80202

Thomas E. Creighton
Michael H. Jackson
Benjamin L. Craig
1415 Security Life Building
Denver, Colorado 80202

Attorneys for Petitioners

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INDEX

TABLE OF AUTHORITIES

CASES

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on August 11, 1975.

Opinions Below

The opinion of the Court of Appeals of August 11, 1975, is reported at 521 F.2d 465 and is printed in the separate Joint Appendix to this petition at pp. 2a-91a. Three memorandum orders and a final decree of the United States District Court for the District of Colorado, all of which were reviewed by the Court of Appeals, are also printed in the Joint Appendix and, except for the decree, are reported as follows: Order of December 11, 1973, determining that petitioner is a dual school system, 368 F. Supp. 207 (Joint Appendix, pp. 270a-282a); orders of April 8, 1974, and April 24, 1974, regarding pupil reassignment and other matters, 380 F. Supp. 673 (Joint Ap-

pendix, pp. 122a-269a). The Final Judgment and Decree entered April 17, 1974, is printed in the Joint Appendix at pp. 92a-121a).

Jurisdiction

The judgment of the Court of Appeals was entered August 11, 1975. Petitions for rehearing were thereafter filed and on September 16, 1975, the petitions were denied by the Court of Appeals. (Joint Appendix, p. 1a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional Provision Involved

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which is set forth in the Joint Appendix, p. 283a.

Questions Presented

1. Did the courts below incorrectly follow the directions of this Court in determining that petitioner School District's conduct with respect to four schools in a system of 119 schools had sufficient effect, at the time of retrial more than a decade later, to cause all of the racial imbalance now existing in the other 115 schools in the system, thereby constituting it a dual system, and denying petitioners the opportunity to show that current ethnic imbalance, which arose earlier in the "core city" part of the district, was not caused by any segregative act of petitioners?

2. Is a school district, found to be a dual school system solely on the basis of acts of discrimination limited to four schools at a time ten to fifteen years prior to such finding, thereby required to reassign pupils throughout the entire school district to achieve specified racial and ethnic balances in the schools, to hire teachers with the goal of reaching ethnic ratios that reflect pupil ethnic ratios, and to continue to reassign pupils to maintain the decreed ethnic ratios?

Statement of the Case

Earlier History of the Case

This is an action brought in the names of several Denver schoolchildren and their parents seeking orders declaring all the racial and ethnic imbalance or segregation within the schools in the Denver School District[1] to have been unconstitutionally created and maintained by the petitioner School District, and for orders eliminating such segregation. After hearing evidence for a total of 18 days in 1969 and 1970, the district judge found that several acts by the School District in the early 1960s, during a period of massive racial change in the neighborhood involved, tended to have segregative effect as to three elementary schools and one junior high school, and ordered reassignment of pupils to reduce the proportions of Negro[2] pupils in those four schools.[3] But as to all the other racial and ethnic imbalance in the school system complained of, chiefly in the "core city" area, the trial judge found "no comprehensive policy" of segregation. 313 F. Supp. 76. As to what the plaintiffs call the two "pivotal black schools in the core city area,"[4] the judge held that the racial proportions were caused by housing patterns and not by the School District. 313 F. Supp. at 75. The court similarly exonerated the School District as to all other core city schools brought into question.[5]

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[1]The district is co-extensive with the City and County of Denver, embracing over 100 square miles, and served, in 1973-74, a total of 85,438 pupils in 120 schools. Cf. 413 U.S. at 191, n. 2, and 192.

[2]The terms for the three principal ethnic groups — Negro, Hispano, and Anglo — used earlier in this case (413 U.S. at 195, n. 6) are carried forward here. "Minority" as used in this petition means Negro and Hispano combined.

[3]A summary of the procedural history is set forth at 413 U.S. at 194, n. 5.

[4]Manual High School and Cole Junior High School (brief of Keyes, et al., petitioners, in this Court in No. 71-507, p. 91), which, at time of trial, had Negro pupil proportions of 60.2% and 72.1%, respectively.

[5]Morey, Boulevard, and Columbine. See 313 F. Supp. at 75 & 76.

The case was in this posture, with four schools[6] found to have been affected by segregative acts and with remedy orders in effect, when the case was reviewed by this Court on certiorari. *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

In making the findings regarding the four schools in the Park Hill area, the trial court described the several acts[7] between 1960 and 1965 in terms of a "policy." The policy was held to have the purpose of isolating Negro pupils "first in Barrett and later in Stedman and Hallett . . . in the face of a steady influx of Negro families into the area" with the "ultimate effect" of creating "segregated situations" at those three schools and at Smiley. 303 F. Supp. at 294, 295.

In 1969 and prior to this suit the Board of Education adopted pupil reassignment resolutions deemed designed to improve racial balance in the four schools, but the resolutions were rescinded before they were implemented and were replaced by voluntary pupil transfer provisions. This act was held by the trial judge to be an act of restoring and perpetuating the segregation at those four schools. 303 F. Supp. at 295. On these findings, the trial court observed that the "segregation policy" as to the four schools in Park Hill was followed for nearly ten years prior to 1969. Id., at 287, 294.

The rescinded resolutions were also later found to be designed to counteract racial transition in progress at a nearby high school[8] and to decrease pupil-teacher ratios at Cole; in both cases the trial court found that the rescission threatened

[6]Barrett, Stedman, and Hallett Elementary Schools, and Smiley Junior High School.

[7]The acts consisted of construction in 1960 of an elementary school (Barrett) in a neighborhood which had recently become predominantly Negro, boundary adjustments between elementary schools in 1962 and 1964 affecting Hallett and Stedman Schools, the addition of pupil capacity at Hallett School in 1964 and 1965 by means of mobile classrooms and a building addition, and permitting the proportion of Negro teachers at Barrett and Smiley to rise significantly above the district-wide average in the early 1960s. 413 U.S. at 192; cf. 521 F.2d at 469, Appendix, pp. 5a, 6a.

[8]East High School.

to damage the quality of education and was for that reason unconstitutional. 313 F. Supp. at 67.

The Court of Appeals expressly did not decide whether the rescission of the racial balancing plans was an unconstitutional act, having sustained the finding as to the earlier acts affecting the four schools. 445 F. 2d at 1002. But upon review by this Court, the respondents presented a tabulation[9] which not only included the four schools found to have been affected by segregative acts, but also East and Cole, where the sole offending act was to cancel plans having educational rather than desegregative effect, and Park Hill and Philips Elementary Schools which, with East, had been expressly held not to be segregated schools. 303 F. Supp. at 292, 294, and 313 F. Supp. at 67.

This tabulation, not part of any finding by courts below, was adopted by the Court in the opinion by Mr. Justice Brennan, which observed that the "segregation policy" of the School District affected pupils in eight schools, rather than four, and that the eight schools served a large proportion (37.7%) of the Negro pupils in the district. 413 U.S. at 199.[10] This observation, coupled with the trial judge's description of a policy extending over a ten-year period in the 1960's, made it possible for this Court to suggest that the Denver school system resembled one which has "carried out a systematic program of segregation affecting a substantial portion of the students, teachers, and facilities within the school system." Id., at 201. The Court then held that in such a case, "there exists a predicate for a finding of the existence of a dual school system." Ibid. But such a finding, if it was to be made, was to be a function of the trial court, and the Court accordingly directed that on remand, "the District

[9]Brief of Keyes, et al., petitioners, in No. 77-507, p. 17.

[10]If the four schools found to be segregated by School District action are used for comparison, the total minority pupil population of those schools was 8.9% of the district-wide total.

Court should decide in the first instance whether respondent School Board's deliberate racial segregation policy with respect to the Park Hill schools constitutes the entire Denver school system a dual system." 413 U.S. at 204.

The summary of the mandate went on to explain that "[i]f the District Court determines, however, that the Denver school system is not a dual school system by reason of the Board's actions in Park Hill, the court [then] will afford respondent School Board the opportunity to rebut petitioners' prima facie case of intentional segregation in the core city schools raised by the finding of intentional segregation in the Park Hill schools." 413 U.S. at 213.[11]

In reviewing this case, this Court thus concluded that both lower courts had failed to apply the correct legal standards in addressing the plaintiffs' claims of deliberate segregation in the core city schools, and vacated the judgment of the Court of Appeals as to those schools and remanded the case to the district court for further proceedings in the light of two legal standards announced. The standards were both to be applied in cases where it is shown that a school district has been found to have engaged in intentional segregation affecting a substantial portion of the pupils in the district.

The first standard is that such a showing forms a "predicate for" and will "suffice to support a finding of" the existence of a dual school system. 413 U.S. at 201, 203. The second standard is that such a showing "creates a presumption that other segregated schooling within the system is not adventitious" (Id., at 208) and shifts the burden of proof to the School District "of showing that their actions as to other

[11]In the summary of the mandate, the Court's opinion also adds a preliminary matter: The determination of whether there may be a physical or geographical barrier confining the effect of the Park Hill acts to that area. The School District had never urged that Park Hill was so separated, and did not urge the point at the hearing following remand.

segregated schools within the system were not motivated by segregative intent." (Id., at 209) and that such actions did not have segregative effect either at the time of the acts or at the time of trial. Id., at 211.

The Proceedings on Remand: the Rulings of the District Court.

(a) *On extent of violation*

Following remand to the district court, a hearing was held, as directed, to determine, first, whether the School District's actions with respect to the Park Hill schools in the 1960s constituted the entire school system a dual system. The court and the parties agreed that the School District would later have the opportunity to show that its actions with respect to the core city schools were free from segregative intent or that the School District did not cause the existing ethnic imbalance in those schools in the event that the court first determined that Denver is not a dual system. 368 F. Supp. at 209, n. 2, Appendix, p. 276a.

At the hearing the School District took the position that the test of whether the segregative acts with respect to the schools in Park Hill made (or "constituted") the entire system a dual system was one of cause and effect, and that the mechanism of this cause and effect is what this Court had described as reciprocal effect. 413 U.S. at 201, 202. This principle was understood to mean that if a school district changes a school's attendance zone or builds a new school so as to concentrate Negro pupils in that school, then, if no other variables are at work, such acts would have the reciprocal and equal effect of concentrating non-Negro pupils in nearby schools. The same might happen as a result of actions having the effect of earmarking a school by race. As thus formulated, there is what amounts to a presumption, but a rebuttable presumption, that there was a reciprocal segregative effect beyond the schools affected by the segregative acts, and the burden of

showing lack of current reciprocal and extra-territorial effect rests, accordingly, with the School District where intentional segregation has been shown.

With this view of the issue, the School District undertook to present evidence as to each of the specific segregative acts making up the "conduct in Park Hill' to show that they did not "have impact beyond the particular schools" (413 U.S. at 203), had not "affected the racial composition of schools throughout the District," (Id., at 204), and were confined in their impact to the Park Hill area.

The evidence offered was limited, of course, to the several acts in the 1960's in Park Hill and to ethnic changes occurring in schools outside that area from and after that time.

The School District offered a statistical study and the opinion of a statistician to show that the building of Barrett school in 1960 did not have any continuing segregative effect in Park Hill or elsewhere in the School District. This evidence showed that the numbers and percentages of Anglo pupils declined steadily in that part of the School District outside of Park Hill during the years after 1960, despite what the district judge had called "a steady influx of Negro families in to the [Park Hill] area" during that same period. 303 F. Supp. at 295. From this trend contrary to the principle of reciprocal effect, and from the uniform and steady pattern of ethnic change, the expert concluded that the construction of Barrett School did not have the effect of intensifying ethnic segregation outside of Park Hill. The expert reached the same conclusion as to the rescission of unimplemented racial balance resolutions at the other end of the decade in 1969.

As for the three boundary changes in 1964 found to have confined Negro pupils at Stedman and Hallett, the School District tendered very specific evidence which showed, the parties agreed (Transcript, p. 346), that the change affecting Stedman actually moved 24 pupils to the nearby school, 20 of whom were minority children, and that the change affecting Hallett actually moved 13 pupils, all Negro, to the nearby school. It had previously been shown (Transcript, trial on merits, pp. 1500-1504) that the other change affecting Hallett School actually moved 70 pupils to the nearby school, 50 of whom were Negro pupils. Thus, all of these boundary changes previously held to have intensified Negro disproportions at Stedman and Hallett were shown to have had the actual integrative effect of reducing white proportions in the adjoining schools.

The School District also offered an exhibit (WV) which illustrated, the parties agreed, that percentages of Negro pupils increased, rather than decreased, at the schools adjoining Stedman and Hallett in 1964 and in most cases at a far faster rate than at the two schools held to have been segregated by the boundary changes that year. Exhibit WV was also offered with regard to the expansion of classroom capacity at Hallett in 1964 and 1965; the exhibit showed that percentages of Negro pupils at nearby schools were increasing, in those years, more rapidly than at Hallett.

During the course of the hearing the district judge appeared to exclude all of this evidence insofar as it was offered to rebut the presumption that the actions in Park Hill had segregative effect elsewhere in the School District. Thus, the judge's ruling as to the evidence offered by the statistician was to "receive it only insofar [as] it might have some probative value in showing the motivation of the Board . . . [its] purposes in other parts of the city. That's the only issue we have before us." (Transcript, p. 270) The evidence offered to prove that the actions in 1964 and 1965 with respect to Stedman and Hallett actually contributed to faster-rising Negro enrollments in adjoining schools, the accuracy of which was agreed upon, was also excluded as irrelevant for

the sole reason that the adjoining schools were not outside Park Hill (Transcript, p. 341)

Finally, the district court excluded evidence offered to show that in 1973, at time of hearing, the Denver system currently bore none of the indicia of a dual system, that it was then being operated as a racially non-discriminatory school system. The judge ruled that the evidence "is not material . . . I cannot take into account his appraisal of the system as it exists now." (Transcript, pp. 358-360)

Following the hearing, the district court, in a memorandum opinion (368 F. Supp. at 207, Appendix, pp. 270a-282a) held and concluded "that the Denver system is a dual system within the Supreme Court's definitions." Id., at 210, Appendix, p. 282a. The first two-thirds of the opinion is given over to a discussion of the burden-shifting branch of the Supreme Court's opinion, which has not yet been reached in this case, and to the possibility of geographical or physical separateness of Park Hill, which was not an issue. The district court then addresses the issue to be determined. Id., at 209, Appendix, p. 277a. In discussing this issue — whether the School District had shown that the Park Hill acts did not have segregative effect in schools elsewhere — the judge stated (1) that all of the School District's tendered evidence had been considered (despite exclusionary rulings to the contrary), (2) that the evidence was intended to show that ethnic imbalance outside Park Hill was "in no way the product of *any* acts or omissions by" the School District (emphasis added), and (3) that this evidence was not sufficient to make the required showing. Ibid., Appendix, pp. 280a, 281a. The district court also mentioned the plaintiffs' evidence on the preliminary matter of the separateness of Park Hill, and referred to the presumption of system-wide intent which was not involved in the duality issue. The district court then stated that this Court had conclusively determined that Denver was a dual system, making the trial court's conclusion "inescapable." Ibid., Appendix, p. 282a.

(b) *On Further Remedy*

Further hearings were then held to determine the form of remedy for the constitutional violation found to exist, and these determinations were set forth in a memorandum order and opinion dated April 8, 1974.[12] This order, and the previous order of December 11, 1973, were then incorporated in a final judgment entered April 17, 1974.

At the request of the district court, the parties[13] submitted plans for the conversion of the "dual system" to a racially nondiscriminatory school system. After hearings, the plans of both principal parties were found unacceptable, the plaintiffs' because of excessive busing, and the School District's because not enough busing was used. The district court then requested a plan from an educational consultant selected by the court, and his plan was adopted by the court after further hearings.

The district court's plan postulated that where Negro and Hispano pupils made up more than 60% (40%-50% at the secondary school level) or less than 30% of a particular school's enrollment, such a school was "segregated or . . . nonintegrated"[14] as the product of the School District's prior action,[15] and therefore required correction by pupil reassignment. The reassignment plan changed the attendance areas of every school in the system. It required that 25% of the dis-

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[12]Reopened and amended in minor particulars, April 24, 1974.

[13]Who now included numerous intervenors, including Congress of Hispanic Educators, an association of Spanish-surnamed teachers, joined by a number of Spanish-surnamed pupils and their parents.

[14]380 F. Supp. at 686, Appendix, p. 171a.

[15]Necessarily those in the Park Hill area in the 1960s.

trict's pupils be bused to schools in distant neighborhoods.[16] Minimum percentages for Anglo pupils were fixed by the court for Manual high school (56%) (380 F. Supp. at 726, Appendix, p. 268a), and for Morey and Cole junior high schools (50% and 60%) (Appendix, p. 96a).

The projected result of this plan was to bring the minority pupil percentages within the specified limits, except in five elementary schools in predominantly Hispano neighborhoods,[17] (Appendix, p. 107a) and the pupil population at those five schools remained predominantly Hispano. Eighteen other elementary schools with minority enrollments exceeding 60% were paired with other predominantly non-minority schools for half day attendance there.

In addition to provisions for periodic reporting, ethnically balanced school assignment of teaching and administrative staff, and monitoring of compliance, the district court's final decree also included orders regulating the hiring, promotion, retention, and dismissal of teachers, staff, and administrators. The court directed the implementation of a program for the hiring of minority personnel with a goal, on a date to be fixed, of ratios of Negro and Hispano personnel which would "reflect more truly" the ratios among the pupils in the schools. Appendix, pp. 116a, 117a. However, there had been no issue raised, no evidence presented, and no findings made that the School District ever engaged in discriminatory hiring practices.

The Appeals; the Rulings of the Court of Appeals.

Appeals were taken to the Court of Appeals by both principal parties and by Congress of Hispanic Educators. The Court of Appeals, in an opinion by Chief Judge Lewis,

[16]Some busing is necessary in Denver under its neighborhood assignment plan, but a much smaller number of pupils would be involved, excluding pupils making use of the majority-to-minority transfer plan and those bused under the Park Hill remedy orders, than the 14,500 figure mentioned by the trial judge (380 F. Supp. at 686, Appendix p. 167a.)

[17]This exception was made in order to implement a pilot program of bilingual-bicultural education at four of the schools.

affirmed the District Court's holding and conclusion that the Denver system is a dual school system, and affirmed in part and reversed in part the district court's orders relating to the desegregation of the system.

Judge Lewis' opinion, while holding that the School District's evidence of lack of extra-territorial effect of the Park Hill acts are relevant (521 F.2d at 471, Appendix, p. 15a), limited such relevance to the preliminary and undispositive issue[18] of "whether Park Hill is a 'separate, identifiable, and unrelated unit' within the district" (Id., at 472, Appendix, p. 16a).

Further, Judge Lewis' opinion also interprets the District Court's memorandum opinion to mean that the expert testimony and statistical evidence regarding Barrett School was fully considered on the issue, as framed by the trial judge, of whether "segregated conditions . . . outside the Park Hill area are wholly the product of external factors such as demographic trends and housing patterns, and are in no way the product of *any* acts or omissions by defendants." (Emphasis supplied) (Id., at 473, Appendix, p. 21a)[19]

Finally, on the question of whether the Denver system is a dual system, both Judge Seth (Id., at 487, Appendix, p. 76a) and Judge Barrett (Id., at 489, Appendix, p. 84a) rested their concurrences on a holding that the Supreme Court itself held that Denver was a dual system, making the District Court's conclusion "inescapable," and leaving no opportunity for a contrary finding. As we point out in stating the reasons for granting the writ, this means that a majority of the court held, in effect, that Denver is a dual system because the Su-

[18]Judge Seth aptly called it a "non-issue" (521 F.2d at 488, Appendix, p. 81a.)

[19]As we point out in stating the reasons for granting the writ, this was not the issue to be heard because the School District, at that hearing, was obligated only to exclude the Park Hill acts as factors in causing ethnic imbalance elsewhere in the system. Cf. Judge Lewis' later and, we submit, correct formulation of the school authorities' burden: "to prove the absence of any causal relation between those acts [i.e., the Park Hill acts] and current levels of racial segregation." 521 F.2d at 474, Appendix, p. 25a.

preme Court conclusively found it to be so. Moreover, both concurring judges confused the burden-shifting part of the remand (Part III) with the duality question (Part II). Judge Barrett observed that it was "impossible" for the School District to meet the burden of showing that its actions "as to be 'segregated schools' . . . outside the Park Hill area were not likewise motivated by a segregative intent." (521 F.2d at 489, Appendix, pp. 84a, 85a). Judge Seth understood that the trial court, following the Supreme Court's directions, reversed the time sequence and "related back in time [the Park Hill acts] to show intent" at the earlier time when the segregation in the core city developed. (Id., at 488, Appendix, p. 78a) But the presumption of similar intent is the basis for the burden-shifting rule explained in Part III (413 U.S. at 207, 208), which was not involved in the hearing on duality.

As for the district court's remedial orders for the elimination of effects of prior acts of segregation and for the establishment of an ethnically nondiscriminatory school system, the Court of Appeals affirmed the system-wide reassignment of pupils to achieve ethnic ratios within prescribed ranges. But the appellate court reversed and remanded those parts of the pupil assignment plan which involved half day reassignment and directed that further hearings be held regarding the five predominantly Hispano schools.

The Court of Appeals also reversed and vacated the educational policy portions of the district court's order calling for the installation of a form of bilingual-bicultural program on a pilot basis at several schools and directing the consolidation of two high schools on a campus basis. But the Court of Appeals viewed the minority teacher recruitment program, with its goal a minority teacher ratio close to the district's minority pupil ratio, as a measure "to ensure faculty desegregation" rather than a remedy for discriminatory hiring and affirmed the order in that regard, without mentioning the absence of findings of any unlawful hiring practices.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to resolve questions of interpreting and applying this Court's standard for determining the existence of a dual school system, where the basis for such determination is the prior — and since remedied — existence of state-imposed segregation as to a substantial portion of that system.

This case illustrates the need for more explicit guidance to district courts dealing with claims that prior segregative acts of a school district, limited in time and place and thereafter remedied, have current and system-wide effect on ethnic proportions in schools where pupil assignment is on a neighborhood basis.

The Denver School District is ready to show, under the terms of Part III[20] of this Court's opinion governing this case, that the racial and ethnic imbalance existing in the Denver schools is not the result of any discriminatory acts of the School District.[21] The School District seeks the chance to show, this time with the burden of proof[21a], that, as the trial judge put it following the original trial on the merits in 1970, "[t]he impact of housing patterns and neighborhood population movement stand out as the actual culprit." 313 F. Supp. at 75.[22]

Standing in the way of this opportunity is the district court's conclusion, following hearing on remand from this Court and applying the standard set forth in Part II[23] of the court's opinion, that "the Denver system is a dual system

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[20] 413 U.S. at 205-214.

[21] The discrimination found to have affected the four Park Hill schools had been long since fully remedied.

[21a] This opportunity is expressly given to petitioners (413 U.S. at 211, 214). Cf. *United States* v. *School District of Omaha*, 521 F.2d 530 (1975), *cert. den.* —— U.S. ——, (November 11, 1975).

[22] As Judge Seth observed, the allegations of unconstitutional acts were fully litigated in the original trial and "[t]he trial court expressly found that no such acts or improper intent existed at any prior time." 521 F.2d at 489, Appendix at p. 78a.

[23] 413 U.S. at 198-250.

within the Supreme Court's definition." 368 F. Supp. at 210; Appendix p. 282a. The direction from this Court, in that branch of the case, was to

> "determine whether respondent School Board's conduct over almost a decade after 1960 in carrying out a policy of deliberate racial segregation in the Park Hill schools constitutes the entire school system a dual system." 413 U.S. at 213.

This test, as a preliminary hurdle to permitting the School District to clear itself of fault for the ethnic imbalance in the core city schools, was, we submit, misunderstood and wrongly applied by the courts below.[24] Only this Court can now correct the holdings below and give the School District its opportunity to meet the burden of proof as required by Part III.

In this case, we submit, the district court held the school district to proof of far more than the absence of a causal connection between the Park Hill acts in the 1960's and the current ethnic proportions in all of Denver's schools today. As the Court of Appeals found, "the trial court experienced difficulty in interpreting the Supreme Court's opinion." 521 F.2d at 472, Appendix p. 19a. This difficulty involved the persistent confusion of the court's task under Part II of this Court's opinion governing this case, with Part III of the opinion.

Specifically, the district court, throughout its evidentiary rulings and its memorandum opinion on the issue, referred to the presumption of system-wide segregative intent, which is the basis for the burden-shifting rule announced in Part III, and, in the end, required the school district to show that ethnic imbalance outside Park Hill is "in no way the product of *any acts or omissions* by" the school district. (emphasis added) 368 F. Supp. at 210, Appendix p. 281a. But this is

[24]The test itself was disapproved by two members of the Court (Mr. Justice Powell, 413 U.S. at 224, and Mr. Justice Rehnquist, Id., at 264), and may not have been approved by a third (Mr. Chief Justice Burger, who concurred in the result, Id., at 214).

the showing to be made under Part III, where the school district must show that "other segregated schools within the system are not also the result of [any] intentionally segregative actions." 413 U.S. at 208. The showing required under the Part II duality test is much narrower: it is limited to showing that the specific segregative acts in Park Hill in the 1960's were not the cause of the current ethnic imbalance throughout the school district.

Chief Judge Lewis, for the Court of Appeals, while generally successful in addressing the issue framed by Part II,[25] nevertheless ultimately adopted the same overbroad requirement of proof imposed by the trial court. 521 F.2d at 473, Appendix p. 21a.

The other two members of the Court of Appeals panel, who concurred in this part of Judge Lewis' opinion, appeared to do so for reasons which go beyond the appellate court's opinion and which further illustrate the need for more explicit guidance to lower courts on the application of the standard here involved. As explained in the Statement of the Case (p. 13, *supra*), both concurring judges adopt the district court's view that the presumption of duality was conclusive and irrebuttable, and also bring in the system-wide presumption of intent related to the other branch of the case.

The result of these rulings is that both courts below, by requiring the school district to meet the far broader and more comprehensive burden under Part III, measured the school district's evidence, which was directed to show the lack of extra-territorial effect of specific acts during a specific period of time, against the wrong standard. Petitioner school district has thus been deprived of its opportunity to show that its prior actions with regard to all other schools in the system during the relevant past have been free from segregative in-

[25]"the relationship between the Board's segregative acts during the 1960s and current racial conditions . . . Under the terms of the Supreme Court's remand, this was the sole issue for trial." 521 F.2d at 475, Appendix p. 27a, and see n. 19, *supra*.

tent or current segregative effect — in short, deprived of the chance to show that petitioners are now in fact operating a unitary system, free from discrimination or the effects of any prior discrimination.

This opportunity is, of course, important to petitioners. The importance goes beyond freedom from intervention in the management of the school system by the judicial branch. Of the seven members of the Denver school board, three including its president and vice president, are members of minority ethnic groups. A majority of the pupils in Denver's elementary schools are now minority group members, and a similar situation is near at the secondary school level. If, given the chance, the Denver school district shows that it did not cause the ethnic imbalance in its schools, there is every reason to expect that the system will continue to be managed free from discrimination. *Calhoun and Armour v. Cook*, No. 74-2784, 5th Cir., October 23, 1975. Attached Appendix, at p. 3aa.

II

Certiorari should be granted to resolve questions inherent in applying standards developed for disestablishing pure dual school systems (separate schools for each race) to the disestablishment of a constructive dual system (where pupils were never excluded on account of race and where races are mixed in all schools) implied in law from the prior existence of state-imposed segregation in a substantial portion of the system.

This Court has, until now, considered the duties of school authorities and the powers of federal courts in eliminating dual school systems and establishing unitary systems only in the context of school districts maintaining two sets of schools, one for white pupils and one for Negro pupils within a single school system. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, at 5 & 6 (1971); *Alexander v. Holmes*

County Board of Education, 396 U.S. at 19 (1969).[26] In such a school system it was not unreasonable to postulate that all racial imbalance was the consequence of the state-enforced separation of races, and that, accordingly, in such "state-compelled dual systems" (*Green v. County School Board of New Kent County*, 391 U.S. 430 (1968)) the undoing of the effects of the complete separation of the races would require, as a starting point, "the greatest possible degree of actual desegregation". *Swann, supra.*, at 26.

But where, as in Denver, the dual nature of the system is derived from the presumed system-wide effects of a limited number of segregative acts affecting four schools in a limited time period ending nearly ten years before retrial, the "dual system" resulting must logically be different from the kind of dual system previously considered by the Court. In other words, if Denver's is a dual system, it is a dual system with a difference.

The most important difference is that the ethnic imbalance in the Denver system existing prior to the segregative acts in Park Hill, whose effects render the system a dual system, cannot possibly have been caused by the acts in Park Hill.[27] Causes inherently can only have prospective effects.

This means that only that segregation which developed in the Denver school system during (and possibly after) the 1960's, when the Park Hill acts occurred, can be attributed to the School District and considered as part of the dual nature of the system. The plaintiffs, in attacking the School

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[26] *Milliken v. Bradley*, 418 U.S. at 217, although dealing with a school district found to be segregated throughout the system by deliberate actions of the school authorities, dealt with the validity of a cross-district remedy, rather than a single district remedy. And the previous decision of this Court in this case (413 U.S. 189) addressed the question of violation, not remedy. Id., at 198.

[27] Circuit Judge Seth noted the problem of retroactive consequences of the Park Hill acts, but he discusses it in the context of the burden-shifting branch of the case (Part III) which imputes segregative *intent* backward in time. He noted, significantly, that "all the time problems were not . . . resolved." (521 F.2d at 488, Appendix at p. 78a) and voted to remand for a complete reconsideration of the remedy.

District's evidence offered to prove the lack of extra-territorial effect of the Park Hill acts, recognized this temporal limitation of the effect of those acts, and sought to show that other factors at work, *after 1960*, extended the effects of the building of Barrett Elementary School that year outside Park Hill. Appendix at p. 17a, 18a.

The implications of this difference in fashioning a remedy for Denver's particular kind of dual system were ignored by the District Court in rejecting the School District's remedy plan and developing its own plan. Yet, this Court has clearly stated that "the nature of the violation determines the scope of the remedy" (*Swann, supra.* at 16) and that "the scope of the remedy is determined by the nature and extent of the . . . violation." *Milliken* v. *Bradley, supra.* at p. 744. It follows that the remedy in Denver's case, while system-wide and not limited to the Park Hill area, is limited to those schools in the system which were affected by the acts in Park Hill in the 1960's. The School District would have the burden of showing, in the remedy phase of the case, which schools were unaffected by the acts in Park Hill in the 1960's.[28] And the concern of the Court of Appeals in that regard (521 F.2d at 476, Appendix at p. 34a) is misplaced. Thus, the School District may, but need not, as a constitutional matter, remedy such ethnic imbalance as existed prior to 1960 and which was not intensified by the presumed system-wide effects of the Park Hill acts after that year.

This is entirely in harmony with the directions of this Court regarding the remedial duties of the School District in the event the system is determined to be a dual system. In such event,

> "As in cases involving statutory dual systems, the School authorities have an affirmative duty 'to

[28]Analogous to the burden of school districts operating statutory dual systems in justifying the continued existence of predominately minority schools. *Swann, supra.* at 26.

> effectuate a transition to a *racially non-discriminatory school system*' " [*Brown II*, 340 U.S. at 301] 413 U.S. at 203 (emphasis added)

This duty was stated in essentially the same terms thirteen years after *Brown II* in *Green, supra.*, at 438, as an

> "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which *racial discrimination would be eliminated* root and branch." (emphasis added)

When the duty of the Denver school authorities was restated in the summary of the mandate in this case (413 U.S. at 213) the reference to the "root and branch" requirement in *Green* equates the duty to "desegregate the entire system" with the familiar duty to "eliminate racial discrimination" root and branch.[29] Of course, the continuing effects or vestiges of prior discrimination must be eliminated, as well as active current discrimination, and where all racial segregation is the result of prior complete separation of race by law, "the greatest possible degree of actual desegregation" will be required. *Swann, supra.* at 26. But that is quite different from applying, as the District Court did in this case, a percentage test to the ethnic composition of every school in the system, without regard to the nature of the school's ethnic composition prior to 1960, when segregative acts first occurred. As Judge Seth put it in urging reversal of the entire remedy order in this case,

> "However, where as here, the unconstitutional acts are clearly identifiable, are specific, and are limited in time and scope, it would appear that the remedy can be more effective if it is related to the specific

[29]The Court of Appeals for the Fifth Circuit (Wisdom, Thornberry, and Clark, JJ) understands that it is the elimination of discrimination (and its effects), rather than racial balance, which is the aim of the Fourteenth Amendment. *Calhoun* and *Armour* v. *Cook*, Attached Appendix, at p. 4aa.

wrongs rather than to what is right as well as what was wrong. Any remedy must zero in on the violation if it is to be effective and responsive. It was error, in my opinion, for the trial court to apply the mechanical or computer mix recommended by Dr. Finger." (521 F.2d at 488, 489, Appendix at pp. 81a, 82a).

III

Certiorari should be granted to correct other departures, by the courts below, from this Court's requirement that the remedy for state imposed school segregation be limited by the nature and extent of such segregation, where those courts have ordered ethnic quotas for teacher hiring and continued reassignment of pupils to maintain decreed ethnic ratios.

This case presents a plain illustration of how judicial authority can improperly enter the area of the plenary powers of school authorities, when care is not taken to examine the nature of the violation. *Swann, supra,* p. 16.

With regard to teachers, school districts can violate their Fourteenth Amendment rights by racial discrimination in hiring or assigning them to schools. School districts can also discriminate against pupils by racially earmarking schools through racially-based assignments of teachers. These are three separate and distinct kinds of violation.

In this case, the practice, prior to 1964, of assigning Negro teachers to schools with substantial numbers of Negro pupils[30] was held to have the effect of tending to earmark two of the four segregated schools. 303 F. Supp. at 290, 294. That finding was made at the very outset of this case, and at no time since then, until the formulation of the present decree, was the trial judge asked to make orders regarding the assignment of teachers. See *Higgins v. Board of Education of City*

[30]Under the now-outmoded educational theory of the day. 445 F. 2d and 1007; cf. 303 F. Supp. at 284.

of Grand Rapids, 508 F. 2d at 783, n. 3 (6th Cir. 1974) And there was never any claim in this case that Denver practiced racial discrimination in hiring teachers; the only evidence on this point was to the contrary, that Denver has for years made special efforts to seek out and hire minority teachers; and there are no findings in this case of hiring discrimination.

Yet the district court ordered the School District to hire minority teachers on a priority basis with the goal of teacher ratios "more truly" reflecting the ratios of minority pupils in the schools, and attached conditions regarding reporting and justification. Appendix, pp. 116a-118a. But where the violation is *pupil* segregation by school earmarking, the only remedy required is to prohibit the earmarking and order the uniform proportionate assignment of teachers by race, throughout the system.

Nevertheless, the Court of Appeals included the affirmative hiring order among the desegregation measures (521 F.2d at 484, Appendix, pp. 63a, 64a) and approved them. In the absence of a finding of discrimination in hiring, the order in that regard exceeds the powers of the courts below.

Finally, the district court imposed on the School District "a duty to control the assignment of pupils so as to prevent any school from becoming racially identifiable as a segregated school." (Appendix, p. 100a)

Denver is not a demographically static community. The total numbers of pupils and percentages by ethnicity in the Denver system, at the time this suit was commenced, at the time the remedy order under discussion was entered, and today are as follows (413 U.S. at 195, n. 6; Defendants' Exhibit YI):

	9/69	9/73	9/75
Negro	14.1%	17.6%	19.1%
Hispano	20.2%	24.1%	27.2%
Anglo	65.7%	57.1%	50.7%
Total pupils	96,580	85,438	76,503

If the decree now in effect and being carried out establishes a unitary system, then the order to make periodic adjustments in the racial composition of the schools, in the absence of deliberate altering of such composition by an agency of the State, goes beyond the remedial powers of the court (*Swann, supra,* at 32.), and the order should be qualified accordingly. (See *Spangler* v. *Pasadena City Board of Education,* 375 F. Supp. 1304 (1974), *cert. granted sub. nom. Pasadena City Board of Education* v. *Spangler,* No. 75-164, November 11, 1975.)

CONCLUSION

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

William K. Ris
1140 Denver Club Building
Denver, Colorado 80202

Thomas E. Creighton
Michael H. Jackson
Benjamin L. Craig
1415 Security Life Building
Denver, Colorado 80202

Attorneys for Petitioners

Attached Appendix

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 74-2784

VIVIAN CALHOUN, et al,

Plaintiffs-Appellants

EMMA ARMOUR, et al,

Intervenor-Appellants

v.

ED S. COOK, et al,

Defendants-Appellees

On Appeal from the United States District Court for the Northern District of Georgia

(October 23, 1975)

Before WISDOM, THORNBERRY and CLARK, Circuit Judges:
CLARK, Circuit Judge:

Since 1958 when this school desegregtaion suit was filed, the winds of legal effort have driven wave after wave of judicial rhetoric against the patrons of the Atlanta public school system. Today hindsight highlights the resulting erosion, revealing that every judicial design for achieving racial desegregation in this system has failed. A totally segregated system which contained 115,000 pupils in 1958 has mutated to a substantially segregated system serving only 80,000 students today. A system with a 70% white pupil majority when the litigation began has now become a district in which more than 85% of the students are black. Notwithstanding the lack of success in integrating these classrooms, our task is to test whether the plan approved for district

operation realistically promises effective protection now for the right of the pupils to a nondiscriminatory education.

Almost predictably, changing circumstances during these years of litigation have dissolved the initial unity of the plaintiffs' position. This is most graphically demonstrated by the fact that the instant appeal is taken from a district court order which adopts a plan developed and agreed to between a substantial number of locally represented black plaintiffs and the school district's officials, the present majority of whom are black. The moving force behind the present appeal, the original counsel for the plaintiff class, emphasize that the plan approved and implemented by the district court was and still is objected to by them as constitutionally inadequate. They urge that reasonably available techniques to achieve further school desegregation, particularly the transportation, zoning and pairing of white students into predominantly black schools, have not been utilized. Finally, they emphasize such desegregation as has been accomplished under the plan approved has been effected entirely by the transportation of black pupils to predominantly white schools.

The district has been operated under the plan in question for the past two years. Its principal objective — to achieve at least 30% black enrollment in every majority white school in the system — has been substantially met. The plan also achieved a goal of strengthening a program to encourage voluntary transfers by pupils of the majority race group in any school into any other school in which their race was in the minority. However, the flow in this transfer program has been only from black to white schools. The plan's success in these achievements has had little effect on the all, or substantially all, black schools. Out of 148 schools in the city system, Atlanta still operates 92 schools with student bodies which are over 90% black.

Following a suggestion initially advanced by the district court in July, 1971 (332 F.Supp. at 809), a separate action

was brought before a three judge district court styled *Armour v. Nix*, (Civil Action No. 16708, D.C., N.D.Ga.). It seeks to combine or consolidate the Atlanta school system with the public educational facilities in neighboring communities. The order presently on appeal reserved any ruling on the question of such consolidation pending the outcome of the three judge action and notes that "all matters pertaining to the metropolitan school systems have been severed from this proceeding and are reserved for further resolution in *Armour*."

The district court found the plan submitted by the parties to be constitutionally realistic and viable for the Atlanta school district, and to accord with the prior directives of this court in this case. It therefore adjudicated that "the Atlanta school district was unitary and has purged itself of all vestiges of the formerly state imposed dual system". Appellants urge that existing precedent will not allow us to affirm this adjudication of unitary status to a school district which has never utilized non-contiguous pairing, has never bussed white children into predominant black schools and in which over 60% of its schools are all — or substantially all — black. These contentions appear to be supported by substantial precedent. However for today and in Atlanta, the unique features of this district distinguish every prior school case pronouncement. The district court found that the black citizens who occupy the majority of the posts on the school board, in two-thirds of the posts in the school administration and staff and in over 60% of the faculty, as well as the numerous non-appealing black plaintiffs who agreed to and support the present plan attest the district's lack of discrimination against black students as well as its freedom from the effects of past race-based practices. The district court also found that Atlanta's remaining one-race schools are the product of its preponderant majority of black pupils rather than a vestige of past segregation. These findings are not clearly erroneous.

The aim of the Fourteenth Amendment guarantee of equal protection on which this litigation is based is to assure that state supported educational opportunity is afforded without regard to race; it is not to achieve racial integration in public schools. *See* Milliken v. Bradley, 418 U.S. 717, ..., 94 S.Ct. 3112, 3125, 41 L.Ed.2d 1069, ... (1974); Alexander v. Holmes County Board of Education, 396 U.S. 19, 20, 90 S.Ct. 29, 29-30, 24 L.Ed.2d 19, 21 (1969); Brown v. Board of Education, 349 U.S. 294, 301, 75 S.Ct. 753, 756, 99 L.Ed. 1083 (1955). Conditions in most school districts have frequently caused courts to treat these aims as identical. In Atlanta, where white students now comprise a small minority and black citizens can control school policy, administration and staffing, they no longer are. *See* Swann v. Charlotte-Mecklenburg Board of Education (Part V), 402 U.S. at 22, 91 S.Ct. at 1279, 28 L.Ed.2d at .... (1971).

Plaintiff-appellants criticize the Majority to Minority Transfer Plan which the district court ordered implemented because the movement involved is entirely by black students. However, participation in this program is solely on a voluntary basis. In ultimate analysis it requires no more or less from pupils than the standard majority to minority provision which we have traditionally required be incorporated in all school desegregation orders in this circuit. *See, e.g.,* Ellis v. Board of Public Instruction, 423 F.2d 606 (5th Cir. 1970).

Atlanta, "The City too busy to hate," has developed the reputation of being a community of racial and social goodwill dedicated to effective progress in both its business and social conduct. Many intangibles we cannot now predict may have a beneficial effect in the future on the degree of racial integration in this system, but these possibilities are not the basis for our affirmance. Rather, we refuse to disturb the district court's approval of the plan submitted for the present operation of this school district, because based on live, pres-

ent reality it is free of racial discrimination and it wears no proscribed badge of the past. *See* Bradley v. School Board of City of Richmond, Virginia, 462, F.2d 1058 (1972) (en banc), *affirmed by equally divided court,* 412 U.S. 92 (1973); Spencer v. Kugler, 326 F.Supp. 1235 (D.N.J. 1971), *affirmed in memorandum decision,* 404 U.S. 1027, 92 S.Ct. 707, 30 L.Ed.2d 723 (1972).

Thus, we affirm the court's action in approving and directing implementation of the present plan for the operation of the district and the related requirements for filing semi-annual reports and for the strengthening of the functioning of the Bi-Racial Committee. However, discretion clearly indicates that the termination of this litigation should await the final determination of the metropolitan area issues pending in *Armour v. Nix*. Therefore, the district court must retain jurisdiction of this cause at least until that consolidated cause has been finalized.

AFFIRMED